

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NORMA GILBERT,
Plaintiff,

v.

Civil Action No. 92-0258

LOUIS W. SULLIVAN, M.D.
Secretary of Health and
Human Services
Defendant

MEMORANDUM AND ORDER

This is an objection to the Magistrate Judges's Report and Recommendation dated February 2, 1993, recommending that Defendant's Motion to Dismiss be denied and Plaintiff's Motion for Summary Judgment be granted. For the reasons set forth below, the Report and Recommendation is rejected; Plaintiff's Motion for Summary Judgment is denied, and Defendant's Motion to Dismiss is granted.

FACTS

On November 13, 1984, Plaintiff applied for social security disability benefits. Her application and a later motion for reconsideration were both denied.

On June 13, 1990, Plaintiff filed a new application for disability benefits. Once again, her application was denied. This time Plaintiff appealed to an administrative law judge ("ALJ"). In considering Plaintiff's appeal, the ALJ reviewed evidence regarding Plaintiff's medical history that had been presented in connection with her 1984 application. The ALJ found that Plaintiff was disabled, and that her disability had commenced on April 30, 1984.

However, because retroactive benefits cannot be paid for more than 12 months, Plaintiff was unable to recover any benefit for the period from 1984 to 1989.

Accordingly, Plaintiff requested that her 1984 application for benefits be reopened pursuant to 20 C.F.R. § 404.988, which permits a prior administrative decision to be reopened within four years for good cause or at any time if certain conditions enumerated in the Regulations are satisfied.¹ The ALJ denied the Plaintiff's request on the grounds that the decision regarding the 1984 application was more than four years old and that it was not erroneous on its face.

The Plaintiff appealed to this Court contending that the ALJ's examination of evidence pertaining to the 1984 application constituted a "constructive" or de facto reopening of the 1984 case. On that basis, she moved for summary judgment seeking the benefits she claims are due her for the period 1984-1989. The Secretary countered with a motion to dismiss arguing that there was not a de facto reopening of the 1984 case and that this Court lacks jurisdiction to review the ALJ's refusal to reopen that case.

Both motions were referred to a Magistrate Judge for a Report and Recommendation. The Magistrate Judge concluded that

¹ The Regulations specify eleven circumstances in which an application may be reopened more than four years after the initial determination. See 20 C.F.R. §§ 404.988(c)(1)-(11). They include fraud, an inaccurate determination of death on which benefits were incorrectly awarded or denied, the award of duplicative benefits by the Railroad Retirement Board, and the erroneous reliance upon an applicant's criminal conviction which bears directly upon the propriety of an award or denial of benefits. 20 C.F.R. §§ 404.988(c)(1), (3)-(4), (5) & (11).

there was a de facto reopening of the 1984 case rendering the decision in that case reviewable. The Magistrate Judge also reasoned that, because the ALJ found that Plaintiff's disability began in 1984, Plaintiff was entitled to benefits from that time forward. Accordingly, the Magistrate Judge recommended that Plaintiff's Motion for Summary Judgment be granted and the Secretary's Motion to Dismiss be denied. The case is now before the Court on Defendant's objection to the Magistrate Judge's Report and Recommendation.

DISCUSSION

The Secretary of Health and Human Services (the "Secretary") has discretion to determine whether a previously decided case should be reopened. Califano v. Sanders, 430 U.S. 99 (1977). The Secretary's denial of a request to reopen is not a "final decision" and, therefore, is not subject to judicial review. Califano, 430 U.S. at 108. See also 42 U.S.C. § 405 (limiting judicial review to a "final decision of the Secretary"). The prohibition against judicial review applies even when abuse of discretion is alleged. Coates v. Bowen, 875 F.2d 97, 100 (7th Cir. 1989). However, if the Secretary does reopen a prior case, the decision in that case is subject to judicial review. Malave v. Sullivan, 777 F. Supp. 247, 252 (S.D.N.Y. 1991).

A prior case may be deemed to have been reopened even though the Secretary does not expressly characterize his action as a reopening of the case. By reconsidering the merits of a previously denied application, the Secretary may be said to have de

facto or constructively exercised his discretion to reopen the case. Robertson v. Sullivan, 979 F.2d 623, 625 (8th Cir. 1992). In such circumstances, the prior decision becomes subject to judicial review to the extent it has been reopened. Id. at 625; McGowen v. Harris, 666 F.2d 60, 65-66 (4th Cir. 1981).

It is clear from the record in this case that no de facto reopening of the 1984 claim could have occurred. The Secretary is authorized to reopen a previously decided case within four years for "good cause." However, the Secretary may not reopen such a case after four years unless it falls into one of the narrow exceptions specified in the Regulations. See 20 C.F.R. § 404.988; see also Coates, 875 F.2d at 102 ("Since more than four years . . . had elapsed since the denial of Mr. Coates' claim, even under the [doctrine of de facto reopening], the ALJ had no authority to reopen the case."); Robinson v. Heckler, 783 F.2d 1144, 1146 (4th Cir.) (doctrine of de facto reopening applies only to petitions to reopen within the four year time period), cert. denied, 476 U.S. 1172 (1986).

In this case, Ms. Gilbert does not even allege that any of the exceptions enumerated in section 404.988(c) apply. Moreover, the ALJ expressly found:

Inasmuch as more than 5 years have elapsed since the [final determination of claimant's previous application and the filing of her present application], and there is no indication in the record of fraud, similar fault or error on the face of the previous determinations, those determinations . . . may not be reopened and revised and would remain Administratively final (20 C.F.R. §§ 404.987

through 404.989 and 416.1487 through
416.1489).

Decision of the Administrative Law Judge at 2 n. 1.

Even if a de facto reopening could have occurred, the record does not support a conclusion that it did. As already noted, the ALJ explicitly stated that he was not reopening the 1984 case. Nor did actively reexamine the previous determination. See, e.g., Cleaton v. Secretary of HHS, 815 F.2d 295, 298 (4th Cir. 1987) ("We find that the previous determination denying your claim was proper under the law.").

The only act committed by the ALJ that could arguably be considered to be a de facto reopening is the ALJ's examination of the entire record that included evidence of Plaintiff's medical condition at the time of her 1984 application. However, the ALJ is obligated by both fairness to the claimant and by statute to examine the entire evidentiary record. McGowen, 666 F.2d at 67 (fairness to claimant); 42 U.S.C. § 423(d)(5)(B) (in determining whether an individual is disabled, "the Secretary shall consider all evidence available in such individual's case record."). If the mere examination of previously-considered evidence constitutes a de facto reopening, then every time an applicant subsequently applies for disability benefits, the ALJ's consideration will necessarily reopen the previous decision. See McGowen, 666 F.2d at 67-68 (examination of new evidence, particularly when followed by explicit refusal to reopen, does not constitute de facto reopening). In this case, the ALJ's failure to reevaluate the previous determination, coupled with his explicit statement that he

could not reopen the previous decision, compels the conclusion that the ALJ did not reopen the prior determination.

CONCLUSION

For all of the foregoing reasons, the Plaintiff's Motion for Summary Judgment is DENIED and the Defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED

Ernest C. Torres
United States District Judge

Date: _____